



---

**Portfolio Media, Inc.** | 860 Broadway, 6th Floor | New York, NY 10003 | [www.law360.com](http://www.law360.com)  
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | [customerservice@law360.com](mailto:customerservice@law360.com)

---

## Entergy Wins \$48M Over DOE's Failure To Handle Nuke Waste

By **Stewart Bishop**

Law360, New York (April 24, 2013, 4:09 PM ET) -- The U.S. Court of Federal claims on Tuesday granted a final \$47.8 million judgment to an Entergy Corp. unit and its agent, which claimed the U.S. Department of Energy had failed for years to dispose of spent nuclear fuel from an Arkansas power plant.

Following a remand trial over causation and damages, U.S. Judge Charles F. Lettow found that were it not for DOE's breach of its agreement to collect and dispose of spent nuclear fuel and high-level radioactive waste, System Fuels Inc. and Entergy Arkansas Inc. would have largely avoided the millions in costs they incurred handling the nuclear material.

"Plaintiffs have established to a reasonable certainty that, but for DOE's breach, it would not have incurred costs for three of the four disputed mitigation categories considered at the remand trial, in addition to the \$34,051,573 which was not disputed by the parties," Judge Lettow ruled.

The judge originally sided with Entergy in 2007, finding DOE failed to "fulfill its obligations" regarding its contract concerning Arkansas Nuclear One, and awarded the owners \$48.6 million.

On appeal, the Federal Circuit upheld the decision in part but found the lower court had used the wrong rate to calculate the amount of spent nuclear fuel that would have been removed by DOE had it lived up to its end of the bargain and remanded the case for reconsideration.

The roots of the dispute can be traced back to the Nuclear Waste Policy Act of 1982, in which Congress authorized "the siting, construction and operation of repositories" to be used for the "permanent disposal of high-level radioactive waste and ... spent nuclear fuel."

Under the NWPAA, DOE agreed to accept, transport and dispose of the nuclear fuel and radioactive waste created at the plants.

The NWPAA agreements stipulated that in return, utilities had to pay a one-time fee for the electricity generated and sold prior to April 7, 1983, and a maintenance fee based on the amount of electricity generated after that date, according to court documents.

In exchange, the DOE vowed to begin to disposing of the waste material no later than Jan. 31, 1998. However, as of March 18, the DOE has yet to dispose of any of Arkansas Nuclear One's spent nuclear material, leaving Entergy to deal with the waste.

Judge Lettow ordered the agency to pay millions to counteract the costs Entergy incurred from storing the fuel through June 2006, years after the DOE was to begin the disposal process.

In his Tuesday order, Judge Lettow found that Entergy had established that the government was liable for costs it incurred storing spent fuel that had cooled for a number of years in dry storage casks, and awarded it \$9.1 million.

The judge also found the government liable for the costs of transferring the spent fuel from spent fuel pools to the dry storage casks, which involved a water transfer system and an L-3 crane, and tacked on an additional \$4.7 million in damages.

However, Entergy failed in its bid to recover \$4.1 million it spent dealing with the degradation of Boraflex, a silicon-based rubbery material impregnated with boron carbide it used in spent fuel pools as part of a strategy to absorb neutrons from the spent fuel assemblies, as the judge found the problems with this material would have occurred regardless of whether DOE honored the contract or not.

The judge also held that Entergy is free to bring additional claims for damages incurred from July 1, 2006 to the present.

An Entergy spokesman, Michael Burns, said the company is "pleased with the court's ruling and will continue to pursue recovery of our costs incurred in managing spent fuel as a result of the Department of Energy's failure to remove it as its contracts require."

A DOE spokesman declined to comment, referring all inquiries to the U.S. Department of Justice.

Representatives for the DOJ could not be immediately reached for comment on Tuesday.

On March 31, Entergy shut down both units of Arkansas Nuclear One after a piece of generator equipment fell as it was being moved, killing one plant employee and injuring eight others. No nuclear material was released, and the company said days later that it was making plans for a restart, a process which will take several weeks.

Entergy is represented by Jay E. Silberg, Evan D. Wesser and Alex D. Tomaszczuk of Pillsbury Winthrop Shaw Pittman LLP and L. Jager Smith Jr. of Jager Smith LLC.

The case is System Fuels Inc. et al. v. U.S., case number 1:03-cv-02623, in the U.S. Court of Federal Claims.

--Additional reporting by Keith Goldberg. Editing by John Quinn.

All Content © 2003-2013, Portfolio Media, Inc.